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STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 456

ALFRED HANS WEISS,

Petitioner,

vs.

JOHN W. HOOD, WARDEN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

To the Supreme Court of the United States:

Petitioner, Alfred H. Weiss, prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of the State of Georgia, the highest court in said State in which a decision could be had, affirming the order and judgment of the lower court, namely, Superior Court of Cobb County, Georgia, denying petitioner's release on writ of *habeas corpus* and remanding petitioner to custody of respondent.

Orders and Judgment Below

The order and judgment of the Superior Court of Cobb County is shown in the record at page ten and the order and judgment of the Supreme Court of Georgia affirming

the order and judgment of the lower court was entered on May 7, 1946 (R. 83, 84) and order denying motion for rehearing entered June 6, 1946 (R. 87).

Summary and Short Statement of Matter Involved

Petitioner, at all times in this case involved, was a citizen and resident of the State of North Carolina, but was lately indicted, tried and convicted in the Superior Court of Cobb County, Georgia, on a charge of murder, and by reason of a mercy clause in the verdict was sentenced to be confined at hard labor in the Penitentiary of the State of Georgia, or at such other places as the Department of Corrections of said State may direct, for and during his natural life (R. 78-9).

His mother through a young and inexperienced lawyer of the North Carolina Bar retained Messrs. L. N. Blair and James V. Carmichael, lawyers of the local Cobb County Bar, to defend petitioner on his trial, and also to prosecute an appeal to finality, if one should be necessary. They were fully paid the agreed fee (R. 59), but after return of the jury's verdict, said counsel failed and neglected to file a motion for a new trial, or a motion in arrest of judgment, and wholly failed to perfect and prosecute an appeal.

Petitioner relying on his counsel, as he had a right to do, did not become aware of the abandonment of his case by his counsel until the time within which to file a motion for new trial and also to prosecute an appeal had expired.

Being then without remedy save only by way of a writ of *habeas corpus*, he petitioned for the writ in the Superior Court of Cobb County, Georgia (R. 4, 55), alleging that he was unlawfully deprived of his liberty and denied his rights to due process of law and equal protection of the laws as required by the due process of law and equal pro-

tection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, which provide:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (R. 5, 6, 56),

for the following reasons:

(1)

That he was not afforded a trial by jury as required by the Constitution of the State of Georgia, namely Article VI, Section XVIII, Paragraph I, which provides:

> "The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the Superior & City Courts," (R. 5), (See Section 2-4601, Code of Georgia, Annotated, page 314),

he having been tried before only eleven jurors instead of the Constitutional number of twelve intelligent and upright jurors (R. 4, 5), and which also was a denial of due process of law as provided in Article I, Section I, Paragraph III, of the Constitution of the State of Georgia, which reads:

> "No person shall be deprived of life, liberty, or property, except by due process of law.", (R. 56) (See Section 2-103, Code of Georgia, Annotated, page 76)

and which was also a denial of his rights to equal protection of the laws as required by Article I, Section I, Paragraph II, of the Constitution of the State of Georgia, which reads:

> "Protection to person and property is the paramount duty of Government, and shall be impartial and complete," (R. 56), (See Section 2-102, Code of Georgia, Annotated, page 70).

(2)

That the Superior Court of Cobb County, Georgia, the Court in which the petitioner was tried, convicted and sentenced, had no jurisdiction in the premises for the reason that the evidence adduced upon the trial of the defendant failed to show that the crime was committed in Cobb County, Georgia, as required by Article VI, Section XVI, Paragraph VI, of the Constitution of the State of Georgia, which reads:

> ". . . , and all criminal cases shall be tried in the County where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county." (R. 6), (See Section 2-4306, Code of Georgia, Annotated, page 306).

The record shows that the defendant was ignorant of his rights, unacquainted with the proceedings in the criminal trial against him, and that he did not intelligently, competently, nor expressly waive or consent to a waiver of his rights to a Constituional jury of 12 jurors (R. 57-60), but that the Court, without the express consent of the defendant, without consulting with the defendant, without any inquiry or judicial consideration as to whether the defendant understood the proceedings and was competently and intelligently able to waive said constitutional rights, and without at least one of the defense counsel then and there present in open court being informed, caused the Clerk of the trial court to make a memorandum on the back of a list of the veniremen in words and figures the following: "Verbal agreement for trial with eleven men on the panel" (R. 82).

The Superior Court of Cobb County, after hearing and considering the writ of habeas corpus, denied petitioner relief sought and remanded him to the custody of respondent

(R. 7). Petitioner then took this case to the Supreme Court, State of Georgia, on a Bill of Exceptions (R. 1-3), which court, after hearing and considering the matter, affirmed the decision and order of the lower court (R. 83-85). Petitioner filed his motion for rehearing (R. 85-87), which motion was denied (R. 87).

Jurisdiction

The jurisdiction of this Court is invoked under Section 344-B, Title 28, U. S. C. A. (Judicial Code, Section 237-B as amended by the Act of February 13, 1925).

The petitioner alleges a violation and denial of his rights under the due process of law and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States, and certiorari has issued to inquire into claims of denial of procedural process and equal protection in criminal cases in the State Courts, see:

Snyder v. *Commonwealth of Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575;

Powell v. *State of Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527;

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074;

Patterson v. *Alabama,* 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082;

Hollins v. *Oklahoma,* 295 U. S. 394, 55 S. Ct. 784, 79 L. Ed. 1500;

Brown v. *Mississippi,* 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682;

Grovey v. *Townsend,* 295 U. S. 45, 47, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A. L. R. 680.

Petitioner alleges that the State Court (Georgia) has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

Questions Presented

(1)

Is a defendant in a capital felony trial in a State Court (Georgia) denied his right to due process of law and equal protection of the laws as required by the "Due Process of Law" and "Equal Protection of the Laws" clauses of the 14th Amendment to the Constitution of the United States when Article VI, Section XVIII, Paragraph I, of the Constitution of the said State (Georgia) provides that:

> ". . . the right of trial by jury except where it is otherwise provided in this Constitution shall remain inviolate. . . ."

and a trial by jury within the purview of said Section of the Constitution of the State of Georgia requires that such trial shall be before twelve intelligent and upright jurors and said defendant is afforded a jury trial by only eleven jurors, and it appears that the defendant was ignorant of his rights, unacquainted with proceedings in a criminal trial, and did not intelligently, competently nor expressly waive or consent to a waiver of said rights (R. 57-58), and Article I, Section I, Paragraph III of the Constitution of the State of Georgia provides:

> ". . . no person shall be deprived of life, liberty or property except by due process of law * * *",

and Article I, Section I, Paragraph II, of the Constitution of the State of Georgia provides:

> ". . . protection to person and property is the paramount duty of Government, and shall be impartial and complete . . ."

(2)

Is a defendant in a capital felony trial in a State Court, denied his rights to due process of law and his rights to equal protection of the laws as required by the "Due Process of Law" and "Equal Protection of the Laws" clauses of the 14th Amendment to the Constitution of the United States when Article VI, Section XVI, Paragraph VI, provides:

> ". . . all criminal cases shall be tried in the county where the crime is committed. . . ."

and the record of the trial fails to show that the petitioner committed the alleged capital felony for which he was tried, convicted and sentenced in the County of Cobb, State of Georgia; namely, the jurisdiction of said Court, and Article I, Section I, Paragraph III of the Constitution of the State of Georgia which provides:

> ". . . no person shall be deprived of life, liberty or property except by due process of law. . . ."

and Article I, Section I, Paragraph II of the Constitution of the State of Georgia provides:

> ". . . protection to person and property is the paramount duty of Government, and shall be impartial and complete . . ."

Reasons for Allowance of the Writ

Rights, privileges, and immunities guaranteed to petitioner by the provisions of the "Due Process of Law Clause" and Equal Protection of the Laws Clauses of the 14th Amendment to the Constitution of the United States were denied to him in a capital felony case. The Supreme Court of the State of Georgia has decided Federal questions of substance, and probably not in accord with decisions of this Court as shown in *Patton* v. *United States,* 281 U. S. 276;

Thompson v. *Utah,* 170 U. S. 343; *Thompsett* v. *State of* Ohio, 146 Fed. Second 95.

That the Supreme Court of the State of Georgia has also overlooked the express requirements laid down in Mr. Justice Sutherland's opinion, in *Patton* v. *United States, supra,* to constitute a valid waiver of a jury in a felony case, and has thereby enlarged the force and effect of the case of *Patton* v. *United States, supra,* away and beyond the force and effect intended by this Court to the manifest wrong and injury of the petitioner, and also overlooked the decision in the case of *Thompsett* v. *The State of Ohio, supra,* in regard to a defendant who was ignorant of his rights and unacquainted with the course of proceedings in his criminal trial.

Prayer for Writ

Conclusions

For the reasons stated, it is respectfully submitted and prayed that the petition for Writ of Certiorari be granted.

PAUL CRUTCHFIELD,
JAMES R. VENABLE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 456

ALFRED HANS WEISS,

Petitioner,

vs.

JOHN W. HOOD, WARDEN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Report of Opinion

The opinion of the Supreme Court of the State of Georgia (R. 83-84). Petition for rehearing denied (R. 87).

II

Basis of Jurisdiction

A statement of the basis of jurisdiction is made in the petition preceding commencing at page 5.

III

Statement of the Case

A statement of the case is made in the petition preceding commencing at page one.

IV

Specifications of Error

The Supreme Court of Georgia erred:

(1)

In holding, in view of the evidence introduced in the *habeas corpus* proceeding, the claim of petitioner that he had been deprived of his constitutional right to a jury trial is without merit.

(2)

In failing to find that all the evidence adduced on petitioner's criminal trial did not establish venue as a jurisdictional fact, and that the sentence of petitioner was void.

(3)

In affirming the order of the Superior Court of Cobb County, Georgia, denying the petitioner's release on the writ of habeas corpus and remanding the petitioner to the custody of respondent when the evidence showed that the petitioner was ignorant of his constitutional right and did not competently, intelligently and/or expressly waive or consent to a waiver of his constitutional rights to a trial by a jury of twelve jurors.

(4)

In affirming the order and decision of the Superior Court of Cobb County, Georgia, and holding that the said Superior Court had jurisdiction of petitioner's criminal trial when

there was no evidence adduced on the trial of the case to show that the alleged crime was committed in Cobb County, Georgia, within the jurisdiction of said court, and Article VI, Section XVI, Paragraph VI, of the Constitution of the State of Georgia, provides:

> ". . . all criminal cases shall be tried in the County where the crime was committed . . ."

V

ARGUMENT

Constitutional Jury; Waiver in Criminal Case Involving Capital Punishment; Conditions of Waiver

By common law petitioner could be tried only before a jury of 12 men, no more and no less, and he was without power to waive a common law jury; and this was also the law in the Federal Courts under the Sixth Amendment to the Constitution and as well in those States, whose constitutions provide that the right of trial shall be, or remain, inviolate.

Thompson v. *State of Utah,* 170 U. S. 343.

The Constitution of the State of Georgia perpetuated the common law jury of 12 men, no more and no less:

> "Right of trial by jury; The right of trial by jury, except where it is otherwise provided in this Constitution, *shall remain inviolate* (Italics ours), but the General Assembly may prescribe any number not less than five, to constitute a jury, *except in the Superior & City Courts.*" The Constitution of the State of Georgia: Code Section 2-4601 (6545) Par. 1.

There is no contrary provision elsewhere in the Constitution of the State of Georgia; and there is no Act of the General Assembly purporting to alter the requirements of the Constitution.

In the case of *Patton* v. *United States*, 281 U. S. 276, this court held substantially:

> ". . . before any waiver can become effective the consent of government counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter or rote, but with sound and advised discretion, with an eye to avoid unreasonable and undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

The record made in the criminal trial was a mere memorandum written on the back of a copy of the veniremen list, and afterward transcribed into the minutes of the trial court; the evidence of the Clerk of the trial court:

> ". . . As to where I got this language, 'verbal agreement for trial with eleven men on the panel,' that was agreed to by the attorneys . . . it is written on the jury list . . . I don't remember now who made the announcement, which counsel . . . I got the information to write these minutes from the original, from the jury list . . ." (R. 63-64).

The State introduced in evidence that part of the minutes reading as follows:

> "Verbal agreement for trial with eleven men on the panel." May 8, 1944, in Book MN, page 489.

There was no other, additional or different record made, and from aught that appears there was no agreement of the prosecutor, no sanction of the judge, with caution proportionate to the gravity of the case, and no express and intelligent consent of the defendant.

The fair inference to be drawn from the whole of Mr.

Justice Sutherland's Opinion, in the case of *Patton* v. *United States,* is that the "old rule" (the common law rule perpetuated by the 6th Amendment to the Constitution of the United States and by those Constitutions of the several States where it is provided the right of trial by jury shall remain inviolate) should apply in any case where a common law restraint continued in force and effect.

The testimony of witnesses on the *habeas corpus* proceeding cannot alter or vary the record, and that record being insufficient in law to establish a valid waiver under the principles laid down in the opinion of this Court in the case of *Patton* v. *United States, supra,* there can be no valid waiver under the "new rule" announced in that opinion.

Indeed, it is not altogether clear that this court intended the "new rule" to apply to capital felony cases, and there is strong inference that it did not, but if on a further defining of principle involved it might be the opinion of this Court that the new rule might apply in a capital felony case, then surely this Court will in the light of its reasoning in the *Patton* case, *supra,* require a rigid adherence to the rule of sound and advised judicial discretion, and that this be shown affirmatively of record. This court in so grave a departure from the established mode of trial in criminal cases will certainly not tolerate "the mere matter of rote" consideration shown in the instant case.

But also, the evidence received on the trial of petitioner's habeas corpus proceeding: the trial was conducted by two local attorneys and their assistant for the defendant, with Allan Brombacher, a member of the North Caroiina bar, sitting in at the table; and the Solicitor General of the Blue Ridge Circuit appeared for the respondent. These men, the petitioner, his mother, the Clerk of the Court, and a witness named Austin E. Hogsed, testified. The

testimony of the Solicitor Geenral (R. 65-67) informs only that one of the local counsel conferred with him during the selection of the jury on the proposition of going to trial with only eleven men on the jury panel; that he agreed, and that the local counsel thereupon made the announcement.

As is usual in such a case, the testimony of petitioner (R. 57-58, 74-75) shows the two local lawyers sat at the head of the defense table. Back of them sat Mr. Brombacher, the North Carolina lawyer, and back of him sat petitioner. At the end of the table the assistant of the local lawyers, Mr. Schroeder, sat. The local lawyers were selecting the jury. One of the local lawyers thought very strongly that he and his law partner were in charge of the trial, and that their decisions in the matter of the jury were controlling and binding upon the defendant; his testimony:

> "I don't know that it was any one's suggestion that we go to trial with eleven men on the jury . . . it was a proposition of going to trial with eleven jurors or having to take a juror that might not be favorable to us, and Mr. Blair went over to . . . Mr. Vandivere, and they talked among themselves . . . As to whether or not I am sure that I talked with the defendant and explained to him his rights to be tried with eleven jurors instead of twelve . . . that is not the question." (NOTE: he wholly failed to recognize the rights of the defendant.) ". . . There was no question but what the defendant knew about it; the whole question was whether or not to call another panel or proceed with eleven jurors . . . I told him that . . ." (R. 73).

It was not a question for the lawyer alone to determine. This lawyer could not conceive the client in a criminal case having any power in the direction of his case. The court

should have followed the procedure as outlined in the case of *Patton* v. *United States, supra.*

Exactly similar testimony was given by the other local attorney.

Here is a matter so grave there was no procuring the defendant's expressed and intelligent consent. No, counsel ran the trial; their judgment was supreme even in matters so grave as departing from the established mode of trial; and the defendant was ignored.

And this is further corroborated by the testimony of the assistant to local counsel; his testimony:

> ". . . I did not hear him (leading local counsel) go over to the Solicitor General and make that announcement (agreement to stand trial with eleven men on the jury panel) . . . frankly I don't think that one of the attorneys said anything (before the announcement) about the case being tried with less than twelve jurors. I never heard him (petitioner here) agree to try the case with eleven jurors in open court . . ."

and out of sequence:

> ". . . I assisted in selecting the jury in this case" (R. 67).

It is respectfully pointed out that Messrs. Blair & Carmichael, and their assistant, Mr. Schroeder, were witnesses for the Respondent, and certainly their testimony does not support the proposition that they, or either of them, informed the defendant of his constitutional rights, or that the court obtained from defendant the express and intelligent consent required by the Opinion in the case of *Patton* v. *United States, supra.*

Moreover, the seating arrangement at the defense table, with the defendant seated between Alan Brombacher and Mr. Schroeder, and Mr. Schroeder testifying that nothing was said by the local defense lawyers about standing trial

before a jury of only eleven jurors lends the strongest corroboration to the testimony of the petitioner and Alan Brombacher, his North Carolina lawyer, who both testified they heard and knew nothing of the proposal to stand trial before a jury of less than twelve men (R. 67-69, 60-62).

The Specifications of Errors ought to be sustained by the opinion of this Honorable Court.

Venue Is a Jurisdictional Fact; Must Be Proved Beyond All Reasonable Doubt; Must Exclude Every Reasonable Hypothesis Except That the Offense Was Committed in the County Alleged.

Venue is a jurisdictional fact, and the term 'jurisdiction' as applied to criminal courts, means power to hear and determine. In the instant case, the jury's verdict was for lack of venue a nullity, and the sentence of the court is void.

Johnson v. *State,* 16 Ala. App. 64, 75 So. 270, —.

A court having jurisdiction to entertain a petition for a writ of *habeas corpus,* has jurisdiction on *habeas corpus* to inquire into the jurisdiction of the trial court both as to the subject matter and the person, and to receive evidence outside of the record but not inconsistent with the record.

In the case of *Johnston* v. *Zerbst,* 304 U. S. 458, the Opinion by Mr. Justice Black, the Court held:

> "The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding it would clearly be erroneous to limit the inquiry to the proceedings and judgment of the trial court, and the petitioned court has power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involves an examination of facts outside of, but not inconsistent with the record" (pp. 465-466).

There was special reason why the Supreme Court of Georgia ought to have scrutinized the transcript of evidence heard in the criminal case: two of its highest officers, i. e., attorneys representing the defendant, retained and fully paid both for the trial and an appeal, if one became necessary, after verdict abandoned the defendant's cause, and made representations not tenable in law or fact as excuse for not proceeding with a motion for new trial and prosecution of an appeal, thereby inducing the defendant (petitioner here) to believe his rights were safeguarded, though they were in jeopardy, until the time for both the motion and an appeal had expired, and petitioner was without any other adequate remedy save only a petition for writ of *habeas corpus.*

The judiciary is a part of the State. Its attorneys are the highest officers of its courts; for judges are changing bodies of men, while the bar goes on to the end. And it is unconscionable that the State might gain an ascendency over its citizen by the culpable neglect of one of its officers, and foreclose the citizen of all remedy. The offense is doubly great when the victim is a citizen of a sister State, without knowledge of local laws governing trial and procedure.

The evidence on the criminal trial respecting venue was: the defendant's wife had abandoned her husband and children in North Carolina, and he came to induce her to return, visiting her at the home of a sister, in Marietta, Georgia. That he took his wife and a little niece out for an automobile ride at between 2:30 and 3:00 o'clock in the afternoon (R. 34). A witness fixes the time his wife was first observed shot at 3:30 P. M. (R. 14). This was on the highway between Marietta and Atlanta, just a short distance from the County line in Cobb County. He (petitioner) with his wife beside him in his automobile pulled into a filling station

at about 3:30 P. M. The exact location of the filling station is not fixed in the record. Scrutinizing all of the evidence, it is impossible to fix the location. The very best that can be said as to its location is that it is so close to the County line between Fulton County and Cobb County as to be not more than a few hundred yards from the line. There is not one word in the record that fixes the location where the deceased had been shot.

Major C. H. Millans, Deputy Director of the Department of Public Safety, the Georgia State Patrol, testified;

> "On . . . April 19th, I went to the Crawford W. Long Hospital (to take the statement of petitioner's wife before her death) . . . As To Whether That Was in Marietta—She Didn't Know Where She Was Shot" (R. 38-39).

Major Millans testified also:

> "The way she told me was that when they left the house they were going to Marietta to get lunch . . . I understood that it was on that trip that she was shot . . ." (R. 40).

But in that, Major Millans was manifestly confused, or Mrs. Alfred Weiss, the wife of petitioner, was confused, because Mrs. Grace Cabe, the sister of Mrs. Weiss, and from whose home she left to get a meal at a restaurant in Marietta, and to which she returned, and then again left in company of the defendant, testified:

> "Mrs. Weiss was a sister of mine . . . I was living at that time (time of shooting) in Marietta. I was living with her at the time my sister was shot . . . I was at home when Mr. Weiss came there . . . He first came to my house about 10:30. His wife, my sister, was there. He had a conversation with my sister there at that time . . . I don't hardly remember how long they did talk at my home after that

before they went away, about forty-five minutes, I guess, or an hour . . . He said he hadn't eaten anything that morning, and she finally came down town with him . . . I would say they were gone up town about an hour, I guess. He made a suggestion or request that he go with my sister to Atlanta that afternoon. . . . As near as I can recall, they left between 2:30 and 3:00 o'clock . . ." (R. 33-34).

And on cross-examination, she testified:

"I say that Mr. Weiss came to my house about 10:30 that Tuesday morning, and he came for the purpose of getting his wife and carrying her back home, taking her back to his home and the home where their three small children were . . . I didn't hear her say at any time that she wasn't going back with him, if she did say it. They talked on quite a little bit there and left together to come down town to get lunch. They stayed there at the house before they came to Marietta about forty-five minutes, I guess. And then when they came back they were . . . in good humor with each other . . . They stayed there . . . until something like three o'clock, when they left . . . They were going down (to Atlanta) and meet my other sister late in the afternoon . . . I consented to let my child go along with them just because she wanted to go." (R. 35-38).

In the light of the sister's testimony, *supra*, it is manifestly impossible that so much of Major Millan's testimony as tended to show the defendant and his wife were enroute to a restaurant in Marietta for lunch is correct, and it is certainly the result of confusion. It is impossible to infer venue in or near Marietta, while enroute to a restaurant for lunch, on this testimony.

Petitioner and his wife left the home of her sister in Marietta, in Cobb County, Georgia, with the expressed intention of going to Atlanta, in Fulton Couty, Georgia; and there is nothing in the record upon which it can be inferred

the crime was committed in Cobb County, and from the evidence it is equally possible that the shooting took place in Fulton County.

In the case of *Clark* v. *State*, 55 Ga. App., page 162, the court held:

> "Venue may be proved by circumstantial evidence; but circumstances which show that it is possible that an alleged crime was committed within the jurisdiction of the court are insufficient to establish the jurisdictional element of venue, where from the circumstances adduced it is as possible and reasonable that the crime was committed beyond the jurisdiction of the court."

The established facts may be summarized: Petitioner took his wife and infant niece out for a ride at 2:55 P. M., the party expressing their intention of going to Atlanta, in Fulton County, Georgia. At 3:30 P. M., petitioner drives his automobile into a filling station then and there asking for directions to the nearest hospital in Atlanta. He drove a short distance, and was stopped by two highway police, who escorted him to the Crawford W. Long Hospital in Atlanta, Fulton County, Georgia. The day following one of these officers attempted to secure the statement of petitioner's mortally wounded wife, and the important element of her statement on venue was: she did not know where (at what location) she was shot.

There is no other or different evidence in the record. There is no evidence from which a reasonable hypothesis can be drawn that the venue of the offense is in Cobb County; and it is as reasonable to believe the crime was committed in Fulton County. It was possible that in 35 minutes elapsing between leaving the home of Mrs. Weiss' sister and the time petitioner was first seen with his wife slumped in the front seat that he had driven in and half way across Fulton County, Georgia, and because of their announced

destination it is reasonable to think that in 35 minutes time they had passed out of Cobb County from Marietta into Fulton County into considerable depth, in excess of 15 miles, whereas, the distance from Marietta to the Fulton County line enroute to Atlanta is less than 15 miles.

Venue was not proven.

Conclusions

For the reasons stated, we respectfully submit that the judgment of the Supreme Court of the State of Georgia should be reversed.

PAUL CRUTCHFIELD,
JAMES R. VENABLE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 456

ALFRED HANS WEISS,

Petitioner,

vs.

JOHN W. HOOD, WARDEN,

Respondent.

RESPONDENT'S SUGGESTION AS TO WHY JURISDICTION SHOULD NOT BE ASSUMED BY THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

EUGENE COOK,
Attorney General of Georgia;
DANIEL DUKE,
Assistant Attorney General of Ga.,
Counsel for Respondent.

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RESPONDENT'S SUGGESTION AS TO WHY JURISDICTION SHOULD NOT BE ASSUMED BY THE SUPREME COURT OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

I. Statement of the Case

Alfred Hans Weiss was indicted by a Grand Jury in the Superior Court of Cobb County, Georgia, for the offense of murder on April 25, 1944. On May 8, 1944 he was arraigned for trial, entered a plea of not guilty, was tried by a jury in the Superior Court of Cobb County, Georgia, and was on May 8, 1944 found guilty of murder with a

recommendation to the mercy of the Court. He was sentenced by the Judge presiding to be confined at hard labor in the penitentiary for and during his natural life. The petitioner did not file a motion for a new trial, but began serving the sentence imposed upon him by the trial court. After entering upon the serving of the sentence and without ever having availed himself of the procedure for correcting any alleged errors that might have been committed upon the trial of the case, and after the time allowed by law for correcting any such errors, the petitioner brought a petition for Habeas Corpus against the warden of the prison in which he was serving, alleging that his detention was illegal and unlawful. The writ of Habeas Corpus came on for hearing December 15, 1945 and was continued until January 5, 1946, at which time both the petitioner and the respondent introduced evidence. After hearing the evidence of both sides, the Court denied the writ of habeas corpus and remanded the petitioner to the custody of the respondent. To the trial Court's order denying the writ, the petitioner filed a bill of exceptions and the case was reviewed by the Supreme Court of the State of Georgia. The judgment of the lower Court was affirmed. The petitioner has now filed a petition for a writ of certiorari based on constitutional grounds wherein he asks this Court to review the judgment of the State Supreme Court.

II. The Questions Involved

The petitioner seeks to have this Court review the decision of the Supreme Court of Georgia and to reverse the same because certain alleged violations of rights which he contends are secured to him by the Constitution of the State of Georgia were committed during the process of his trial.

He claims that he was not afforded a trial by jury as required by the Constitution of the State of Georgia in

Article VI, Section XVII, Paragraph 1, and that because his trial proceeded with only eleven jurors, to which he contends he did not expressly consent. He claims this operated to deny him "due process" as provided for in Article I, Section I, Paragraph 3, of the Constitution of Georgia. He also contends that because he was convicted by a jury composed of only eleven jurors, he has been denied "equal protection of the laws" as provided for in Article I, Section I, Paragraph 2, of the Constitution of the State of Georgia.

The petitioner also contends that the Superior Court of Cobb County, Georgia, had no jurisdiction over the person of the petitioner or over the crime for which he was tried, convicted, and sentenced. He grounds this contention upon the premise that the evidence adduced upon his trial failed to show that the crime was committed in Cobb County, Georgia, and for that reason claims that he has been denied the protection secured to him in Article VI, Section XVI, Paragraph 6, of the Constitution of the State of Georgia.

The respondent contends that the 14th Amendment of the United States Constitution does not guarantee a person the right of having errors, which were allegedly committed during the trial of his case and which could have been tested by appeal, writ of error, or other remedial procedure, reviewed, where such alleged errors are raised for the first time in a writ of Habeas Corpus, unless it is apparent upon the face of the record that there has been a substantial departure from the commonly accepted mode of justice that has resulted in a miscarriage of justice.

The respondent further contends that the facts upon which the petitioner relies were open for consideration and review on appeal, but that he did not avail himself of the provisions of Georgia law governing appeals in criminal cases, and that he now seeks to use the writ of Habeas Corpus as a means of testing the validity of his conviction. The petitioner's conviction was not secured in disregard

of his constitutional rights and the writ of Habeas Corpus was not the only effective means of preserving his rights.

The respondent further contends that the petitioner made an intelligent, competent, and self protecting waiver of the one juror and went to trial with eleven jurors and that the circumstances of the case amply corroborate the testimony of his attorneys that such waiver was made.

The respondent further contends that nowhere in the record has the petitioner carried the burden of showing essential unfairness resulting from his waiver of the one juror, but on the contrary, the record shows that, in the circumstances, it would have been unjust for the Court to have refused to permit him to go on trial with eleven jurors.

The respondent contends that where State law amply provides procedure for testing the sufficiency of evidence on the question of venue, and for reviewing errors of procedure occurring on or preliminary to a trial that one who has not availed himself of this procedure cannot invoke the writ of Habeas Corpus as a substitute for an appeal, writ of error, or other revisory remedy for the correction of errors of law or fact in the absence of exceptional circumstances.

III. Brief and Citations of Authorities in Support of Respondent's Suggestions That Jurisdiction Should Not Be Assumed by the Supreme Court of the United States.

Respondent respectfully urges that none of the questions raised by the petitioner are such that this Court should take jurisdiction of the case, because the grounds complained of are devoid of merit.

The facts disclosed by the record will show that the petitioner was indicted, tried, and convicted in Cobb County, Georgia, for the offense of murder. He was represented by two able local counsel and one attorney from his native

State of North Carolina. The verdict of guilty was found by a jury composed of eleven jurors. The evidence submitted by the State on the question of venue is admittedly weak, but we insist that it is sufficient under Georgia law. It is further insisted that even if there had been no evidence as to venue that this procedural insufficiency could not now be raised by the petitioner because he failed to file a motion for a new trial as is provided by Georgia Law and found in Code Section 6-1609 of the Code of 1933, and is as follows:

> "No judgement of a trial Court in a criminal case shall be reversed by either the Supreme Court or the Court of Appeals for lack of proof of venue or of the time of the commission of the offense, save where the particular point has been raised by a ground of the original or amended motion for a new trial."

After conviction, the petitioner entered upon the serving of his sentence. After the time provided by law in which he could have brought a motion for a new trial had elapsed, he sued out a writ of Habeas Corpus in which we insist he raised matters of error committed, during his trial, that should have been raised either by appeal, writ of error, or other revisory remedy.

He claims that he did not expressly consent to his case being tried by eleven jurors and that venue was not adequately proved. The testimony of both his attorneys, of the State attorney, and of others in the Court at the time shows that the defendant (the petitioner herein) had accepted eleven of the jurors that had been placed upon him. Both the petitioner and the State had exhausted their strikes and there was no qualified panel of jurors from which to select the twelfth juror. His attorneys knew of the hazardous position in which the petitioner would be if he accepted the first qualified juror from a new panel drawn suddenly by the Court. The attorneys discussed the matter in his

presence so they state and advised with him about it, then conferred with the State's attorney, and after hearing his approval, asked the Court that they be permitted to waive the twelfth juror and proceed to trial with the eleven already selected. The Court granted the request.

The *Patton* case relied upon by the petitioner held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. The circumstances disclosed by the record in this case show to a demonstrable reality that the petitioner would have been in a hazardous position if the trial court had refused to permit him to submit to a trial of only eleven jurors. He would have, since both the State and the petitioner had exhausted their strikes and since there was no panel left from which to draw the twelfth juror, been forced to accept the first qualified juror drawn into Court by the presiding Judge. His attorneys were totally unprepared for such an eventuality. There was no way they could have intelligently prepared for it. The twelfth juror easily could have been a person who could have, while meeting all requirements as a juror, been unacceptable from the viewpoint of the petitioner. But, being in the position he was in, he elected to stand trial with eleven jurors rather than have the Court summon additional jurors, the first of whom he would have been compelled to accept. If there are any circumstances under which one accused of a crime might waive his right to a trial by twelve jurors and submit to a trial by eleven, I can conceive of no stronger circumstances that those borne out by the record in this case. If the Court had refused the request made upon it by both the attorneys for the petitioner and the attorneys for the State and forced the petitioner to select the twelfth juror from among those it would have summoned, such action on the part of the Court would have been tantamount to the Judge himself selecting the twelfth

juror. Had this been done, it would have raised a nice question of Constitutional Law under the 14th Amendment.

The petitioner made an intelligent waiver of a trial by twelve jurors and elected to be tried by a jury of eleven. See

Patton v. *U. S.*, 281 U. S. 276;
Coates v. *Lawrence*, 46 Fed. Sup. 414, 131 Fed. 2nd 110;
Summons v. *U. S.*, 119 Fed. 2nd 539;
Adams v. *U. S. ex rel. McCann*, 316 U. S. 655.

The essential features of trial by jury have not been disturbed in this case and the petitioner has been afforded every opportunity for a fair and impartial trial. See

Caballero v. *Halspeth*, 114 Fed. 2nd 545;
Coates v. *Lawrence*, 318 U. S. 759.

A defendant's waiver of a trial by a jury or of a trial by a lesser number than twelve jurors need not be in writing. See *Irvin* v. *Zerbst*, 97 Fed. 2nd 257; Certiorari denied in 305 U. S. 597.

The 14th Amendment of the United States Constitution does not guarantee that all criminal trials in State Courts must be by a jury and does not guarantee any particular form or method of procedure in the State Courts. The corrective process supplied by the State for correcting errors is adequate and since the petitioner has not attempted to avail himself of this process, the writ of Habeas Corpus ought not to have been allowed in this case. See

Moore v. *Dempsey*, 261 U. S. 86.

The Court stated in the case of

Carruthers v. *Reed*, 102 Fed. 2nd 933,

> "Where parties, even in criminal cases, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has

> been rendered adverse to them, to obtain a retrial, according to procedure which they have voluntarily discarded and waived • • • They could not deliberately withhold their application for such procedure and then be heard after conviction to assert on Habeas Corpus that their conviction was void."

In Georgia, one may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest. See

Georgia Code 1933, Section 102-106;

Coates v. *Lawrence,* 193 Ga. 379;

Raleigh & Gaston R. R. Co. v. *Bradshaw,* 113 Ga. 862 (2).

The petitioner is asking this Court to grant a writ of certiorari in this case because of what he contends to be a lack of jurisdiction in the Superior Court of Cobb County, Georgia, the Court in which he was tried and convicted.

The jurisdiction of the Superior Courts of Georgia is provided for in the State Constitution at Section 2-3201 of the Code of 1933, and is as follows:

> "The Superior Court shall have exclusive jurisdiction in cases of divorce; *in criminal cases where the offender is subject to loss of life, or confinement in the penitentiary* • • •"

The petitioner was indicted for murder under which indictment, if convicted, he could have been subject to loss of life or confinement in the peniteniary. Proof that the offense for which one is indicted was committed in the county where the indictment was returned is necessary to establish venue. Venue is a matter that can be waived and, under certain circumstances, one who has been convicted may be estopped from claiming that there was no proof of venue upon the trial of his case.

The general jurisdiction of a Court over the subject matter cannot be waived. In this case, the Superior Court

has jurisdiction over the subject matter and we insist that the quantum of evidence introduced at the trial is sufficient under Georgia Law to have established venue, even if this matter had been raised by a motion for a new trial. The facts are that this petitioner did not utilize the procedure established by Georgia Law for testing before the appellate court the sufficiency of the evidence on the question of venue.

It was held in the case of

Luther Brown v. *State of Indiana,* 37 N. E. 2nd. 73,

> "The right guaranteed by the State Constitution to a trial in the county where the offense was committed relates to the venue rather than to the jurisdiction, and may be waived by failure to make the objection at or before trial preventing raising of the question on appeal.
>
> "It is insisted that the type of jurisdiction which a party cannot confer by consent is that a court shall exercise its general jurisdiction over the subject matter which is not conferred upon the court by the Constitution or a valid statute."

It cannot be argued in this case that the Superior Court of Cobb County did not have general jurisdiction of the subject matter.

The petitioner was tried by a court which by the Constitution and statutes of Georgia had jurisdiction of the crime for which he was indicted. He has not raised preliminary to or during the trial any question as to the Court's jurisdiction. He did not after conviction make a motion for a new trial as is required in Code Section 6-1609 of the Georgia Code of 1933, *supra,* touching the question of "lack of proof of venue." After the time had expired to utilizing the procedure set forth in Georgia Law for questioning the proof of venue on his trial, he now seeks to use the writ of Habeas Corpus for correcting what at most is a mere error

of law which could have been corrected by another appropriate remedy.

The Courts have uniformly taken the view that an accused's right as to the place of trial, arising under a constitutional provision expressly granting or guaranteeing to persons accused of crime the right to be tried in, or by a jury of the county or district in which the offense was committed or is alleged to have been committed, may be waived.

State v. *Albee,* 61 N. H. 423;
Dula v. *State,* 292 Tenn. 669, 166 U. S. 638;
King v. *State,* 16 Ala. App. 341.

The fact that no motion for a new trial was ever made by the petitioner and that he raised no objections during the process of his trial nor at the conclusion of the State's evidence at his trial amply warranted the Court in holding upon the hearing of the petition for writ of Habeas Corpus that he waived proof of venue by the State. In addition, the Court hearing his application for a writ of Habeas Corpus was authorized to hold that he is now estopped to raise this question.

The Court stated in the case of

Brown v. *State,* 123 Ga. 502,

> "Failure to establish venue may be taken advantage of under a general assignment of error that the verdict is contrary to law and evidence, though no question on that subject was raised below."

The Supreme Court of Georgia made this ruling at the March Term of 1905 prior to the passage of Section 6-1609, *supra,* which was passed August 21, 1911, and found in Georgia Acts of 1911 at page 149.

At the October Term in 1914, the Supreme Court held in the case of

Marshman v. *State,* 138 Ga. 864 (2),

> "In an act to regulate and prescribe certain matters of review procedure and practice in the courts of this State, it is declared that no judgment of a trial court in a criminal case shall be reversed by the Supreme Court or the Court of Appeals for lack of proof of venue, save where the particular point has been specifically raised by a ground of the original or amended motion for a new trial. In the present case, the particular point that there was no proof of venue of the crime alleged to have been committed, was not raised by any ground to the original or amended motion."

The judgment of the Court below was affirmed.

Both the Supreme Court of Georgia and the Court of Appeals have uniformly followed this practice since the ruling in the *Marshman* case, *supra.* See

Fox v. *State,* 150 Ga. 673;
Shirley v. *State,* 32 Ga. App. 780;
Miller v. *State,* 51 Ga. App. 263.

While not taking the position that this Court can now examine the record to determine whether there was sufficient evidence to establish venue, and strongly insisting that venue is a matter to be determined by the Georgia Courts and by the procedure provided by Georgia Law, this Court's attention is called to the testimony of Grady Holcombe, at pages 13 and 14 of the transcript of the record, and to the testimony of C. L. Heath at pages 15, 16, 17, 18, and 19, which we contend amply prove venue. See

Dumas v. *State,* 62 Ga. 58;
Womble v. *State,* 107 Ga. 666;
Wardlow v. *State,* 66 Ga. App. 575;
Martin v. *State,* 193 Ga. 824.

It is urged that the petitioner waived all questions that are raised as to venue when he failed to file a motion for a new trial, accepted the verdict of the jury, and the judgment of the Court and began serving his sentence. See *Swain* v. *State*, 162 Ga. 777 (6).

The fact that the petitioner has elected to begin serving his sentence and is now seeking his release by means of Habeas Corpus, upon points which he could have raised by appropriate action in appeal, certainly authorizes the implication that he elected to take his chances, rather than face the consequences of another trial should he, by means of a proper appeal, have been granted a new trial. In Georgia, citing the *Swain* case, *supra*,

> "One accused of crime may at his option waive any right guaranteed him by law."

It is insisted that all of the matters complained of by the petitioner are matters of criminal procedure within the authority of the State to adopt and that they violate no provisions of the Constitution of the United States.

The petitioner is somewhat skeptical of the propositions upon which he bases his rights to have this Court grant certiorari for he predicates his contentions upon the ground that his attorneys abandoned him and that now, his only remedy is by a writ of Habeas Corpus.

His attorneys were not appointed by the Court, but were selected by him. In addition to the two local attorneys, he was represented by an attorney from his native State of North Carolina. Nowhere does this petitioner claim that the State of Georgia has by the method of his trial or by any law that operated against him been responsible for his not availing himself of the elaborate procedure provided in Georgia Law for correcting alleged errors transpiring upon the trial of criminal cases. His contention

is that since *his attorneys* did not file a motion for a new trial that he should now be permitted to use Habeas Corpus as a substitute for a writ of error. We do not think this is a tenable position. To permit such a perversion of the ancient writ of Habeas Corpus would be to encourage persons convicted of crime to plant "sleeper errors" in the record and await the time when they could not bring a motion for a new trial, and then go by way of a petition for a writ of Habeas Corpus to gain their immediate freedom. By this means, they could avoid the uncertainties of a second trial.

For the above and foregoing reasons, it is suggested that jurisdiction by this Court should not be assumed.

EUGENE COOK,
Attorney General of Georgia;
DANIEL DUKE,
Ass't. Attorney General.

Addresses:
201 State Capitol,
Atlanta, Georgia.

STATE OF GEORGIA,
County of Fulton:

I, Eugene Cook, Attorney General of the State of Georgia, do certify that I have this day served a copy of the within response upon counsel for petitioner, by mailing a copy of the same to Honorables Paul Crutchfield and James R. Venable at their respective addresses, Volunteer Building, Atlanta, Georgia, and Brown Building, Atlanta, Georgia.

This 25 day of September, 1946.

EUGENE COOK,
Attorney General of Georgia.